Chapter 1
New and ongoing matters

1.1 The committee comments on the following instruments, and in some instances, seeks a response or further information from the relevant minister.

Legislative instruments

Charter of the United Nations (Listed Persons and Entities) Amendment (No. 2) Instrument 2023[9]

FRL No.	F2023L01372
Purpose	This legislative instrument amends the Charter of the United Nations (Listed Persons and Entities) Instrument 2022 to list seven persons and one entity for counter-terrorism financing sanctions under Part 4 of the *Charter of the United Nations Act 1945*
Portfolio	Foreign Affairs and Trade
Authorising legislation	*Charter of the United Nations Act 1945*
Disallowance	15 sitting days after tabling (tabled in the House of Representatives and in the Senate on 16 October 2023). Notice of motion to disallow must be given by 28 November 2023 in the Senate and by 8 February 2024 in the House)[10]
Rights	Fair hearing; privacy

Freezing of individuals' assets

1.2 The *Charter of the United Nations Act 1945* (Charter of the UN Act), in conjunction with various instruments made under that Act,[11] gives the Australian government the power to apply sanctions to give effect to decisions of the United Nations (UN) Security Council. Australia is bound by the *Charter of the United Nations 1945* (UN Charter) to implement UN Security Council decisions.[12] Obligations under

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9 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Charter of the United Nations (Listed Persons and Entities) Amendment (No. 2) Instrument 2023, *Report 12 of 2023*; [2023] AUPJCHR 114.

10 In the event of any change to the Senate or House's sitting days, the last day for the notice would change accordingly.

11 See, in particular, the Charter of the United Nations (Dealing with Assets) Regulations 2008 [F2021C00916].

12 *Charter of the United Nations 1945*, articles 2 and 41.

the UN Charter may override Australia's obligations under international human rights treaties.[13] However, the European Court of Human Rights has stated there is presumption that UN Security Council Resolutions are to be interpreted on the basis that they are compatible with human rights, and that domestic courts should have the ability to exercise scrutiny of sanctions so that arbitrariness can be avoided.[14]

1.3 This legislative instrument lists seven individuals for counter-terrorism financing sanctions under Part 4 of the Charter of the UN Act – the effect of which is to freeze existing money and assets of those listed and to make it an offence for a person to use or deal with a freezable asset (unless it is an authorised dealing) and to provide any future assets to listed persons.[15] The instrument is stated as giving effect to UN Security Council resolution 1373, which requires Australia, as a UN Member State, to freeze the funds, assets and economic resources of persons 'who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts'.[16] Of those individuals listed, three persons are stated to hold dual Australian citizenship, one of whom is currently stated to be located in Australia.[17]

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13 *Charter of the United Nations 1945*, section 103: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'. However, there is a body of academic literature arguing that international human rights law does apply to the UN Security Council (UNSC). See, e.g. Nadeshda Jayakody, 'Refining United Nations Security Council Targeted Sanctions: 'Proportionality' as a way forward for human rights protection', *Security and Human Rights*, vol. 29, 2018 pp. 90–119. At p. 99, the author states that the 'most convincing argument in favour of the application of human rights to the UNSC [United Nations Security Council] is the UN Charter itself. The Charter obliges the UNSC to act in accordance with the UN's purposes and principles, 28 one of which is to "promote and encourage respect for human rights and fundamental freedoms." Another is to settle situations which might breach the peace "in conformity with the principles of justice and international law." As a result, there is a strong textual argument to be made that respect for human rights is inherent in the UN Charter. The UNSC must respect human rights by virtue of its own governing document.'

14 *Al-Dulimi and Montana Management Inc. v Switzerland*, European Court of Human Rights (Grand Chamber) Application No.5809/08 (2016) [140] and [145]–[146]. At paragraph [153], the Court outlined various criticisms of the UN sanctions system with respect to human rights, including consistent criticisms from Special Rapporteurs of the UN and other regional and domestic courts.

15 *Charter of the United Nations Act 1945*, sections 20–22. It is noted that the legislative instrument also lists one entity for sanctions, however, noting that human rights apply to persons not entities, this entry is only concerned with the listing of individuals.

16 United Nations Security Council, Resolution 1373(1)(c), S/RES/1373 (2001), made on 28 September 2001.

17 Item 2. All three individuals listed as dual Australian citizens have had their Australian passports either revoked or cancelled.

Preliminary international human rights legal advice

Rights to a fair hearing and privacy

1.4 The committee's examination of Australia's sanctions regimes has been, and is, focused solely on measures that impose restrictions on individuals that are within Australia's jurisdiction. As this instrument lists an individual who is located in Australia and therefore within Australia's jurisdiction, Australia's human rights obligations are enlivened.[18] It is therefore necessary to assess the human rights compatibility of the sanctions regime under Part 4 of the Charter of the UN Act with respect to individuals in Australia.

1.5 The effect of a listing is that it is an offence for a person to use or deal with a freezable asset (unless it is an authorised dealing) and to make an asset directly or indirectly available to, or for the benefit of, a listed person.[19] A person's assets are therefore effectively 'frozen' as a result of being listed. For example, a financial institution is prohibited from allowing a listed person to access their bank account. This can apply to persons living in Australia or could apply to persons outside Australia and would impact both the persons listed as well as any dependent family or relatives. A listing by the minister is not subject to merits review, and there is no requirement that an affected person be given any reasons for why a decision to list them has been made.

1.6 The scheme provides that the minister may grant a permit authorising the making available of certain assets to a listed person (known as 'authorised dealings').[20] An application for a permit can only be made for basic expenses; a legally required dealing; where a payment is contractually required; or an extraordinary expense dealing.[21] A basic expense includes foodstuffs; rent or mortgage; medicines or medical treatment; public utility charges; insurance; taxes; legal fees and reasonable professional fees.[22]

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18 Noting that the scope of a State party's obligations under human rights treaties extends to all those within the State's jurisdiction. For instance, article 2(1) of the International Covenant on Civil and Political Rights requires a state 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant'.

19 *Charter of the United Nations Act 1945*, sections 20 and 21. Section 22 relates to authorised dealings.

20 *Charter of the United Nations Act 1945*, section 22.

21 Charter of the United Nations (Dealing with Assets) Regulations 2008, section 5.

22 Charter of the United Nations (Dealing with Assets) Regulations 2008, subsection 5(3).

1.7 The listing of a person under the sanctions regime may therefore engage a range of human rights. As the committee has previously set out,[23] sanctions may operate variously to both limit and promote human rights. For example, sanctions prohibiting the proliferation of weapons of mass destruction will promote the right to life. Sanctions could also promote human rights globally. With respect to this instrument, the statement of compatibility states that denying an individual access to assets that could be used to carry out or facilitate terrorist acts of violence, which may take lives, promotes the rights to life and freedom from the advocacy of national, racial or religious hatred.[24]

1.8 However, the sanctions regime also limits a number of human rights, in particular the right to a private life and the right to a fair hearing.[25] The statement of compatibility acknowledges the right to privacy is engaged, but does not identify the potential limitation on the right to a fair hearing and so provides no assessment of compatibility with this right.[26]

1.9 The right to privacy prohibits arbitrary or unlawful interference with an individual's privacy, family, correspondence or home.[27] The freezing of a person's assets and the requirement for a listed person to seek the permission of the minister to access their funds for basic expenses imposes a limit on that person's right to a

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23 See, most recently, Parliamentary Joint Committee on Human Rights, *Report 15 of 2021* (8 December 2021), pp. 2–11 (Autonomous Sanctions), and *Report 8 of 2021* (23 June 2021) pp. 27–35 and *Report 10 of 2021* (25 August 2021) pp. 117–128 (Charter of UN Sanctions). See also *Report 2 of 2019* (2 April 2019) pp. 112–122; *Report 6 of 2018* (26 June 2018) pp. 104–131; *Report 4 of 2018* (8 May 2018) pp. 64–83; *Report 3 of 2018* (26 March 2018) pp. 82–96; *Report 9 of 2016* (22 November 2016) pp. 41–55; *Thirty-third Report of the 44th Parliament* (2 February 2016) pp. 17–25; *Twenty-eighth Report of the 44th Parliament* (17 September 2015) pp. 15–38; *Tenth Report of 2013* (26 June 2013) pp. 13–19; *Sixth Report of 2013* (15 May 2013) pp. 135–137.

24 Statement of compatibility, p. 4. It is noted that the statement of compatibility incorrectly identified other rights as being promoted, such as the right to self-determination (which is a collective, not individual, human right).

25 The sanctions regime may also engage and limit the right to an adequate standard of living if an individual was unable to meet their basic needs or those of their family as a result of their assets being frozen. However, the statement of compatibility (p. 5) has adequately justified this potential limitation. In particular, the provisions allowing for authorised dealings appear to be sufficient to mitigate the risk of the right to an adequate standard of living being impermissibly limited. Further, it is noted that the individual who is located in Australia is detained in Melbourne Assessment Prison and it is therefore likely that his basic needs are being met (such as access to food, shelter and water). This right is therefore not considered in this entry. For a general discussion on the human rights implications of targeted sanctions see Matthew Happold, 'Targeted Sanctions and Human Rights', in Paul Eden and Matthew Happold (eds), *Economic Sanctions and International Law*, Hart Publishing, Oxford, 2016, pp. 87–112.

26 Statement of compatibility, pp. 5–6.

27 International Covenant on Civil and Political Rights, article 17.

private life, free from interference by the State. The measures may also limit the right to privacy of close family members of a listed person. As noted above, once a person is listed under the sanctions regime, the effect of the listing is that it is an offence for a person to directly or indirectly make any asset available to, or for the benefit of, a listed person (unless authorised under a permit to do so). This could mean that close family members who share funds with a listed person may not be able to access those shared funds without needing to account for all expenditure, on the basis that the expenditure could indirectly benefit a listed person, for example, if the funds were used to purchase goods that were provided to the listed person.

1.10 In relation to a similar sanctions regime in the United Kingdom, the House of Lords held that the regime 'strike[s] at the very heart of the individual's basic right to live his own life as he chooses'.[28] Lord Brown concluded:

> The draconian nature of the regime imposed under these asset-freezing Orders can hardly be over-stated. Construe and apply them how one will…they are scarcely less restrictive of the day to day life of those designated (and in some cases their families) than are control orders. In certain respects, indeed, they could be thought even more paralysing. Undoubtedly, therefore, these Orders provide for a regime which considerably interferes with the [right to privacy].[29]

1.11 The need to get permission from the minister to access money for basic expenses could, in practice, impact greatly on a person's private and family life.

1.12 The right to a fair hearing applies both to criminal and civil proceedings, to cases before both courts and tribunals.[30] The right applies where rights and obligations, such as personal property and other private rights, are to be determined. In order to constitute a fair hearing, the hearing must be conducted by an independent and impartial court or tribunal, before which all parties are equal and have a reasonable opportunity to present their case. Ordinarily, the hearing must be public, but in certain circumstances, a fair hearing may be conducted in private. When a person is listed by the minister there is no requirement that the minister hear from the affected person before a listing is made or continued; no requirement for reasons to be provided to the affected person; no provision for merits review of the minister's decision; and no review of the minister's decision to grant, or not grant, a permit allowing access to funds, or review of any conditions imposed. The European Court of Human Rights has emphasised the importance of protecting the right to a fair hearing in the context of sanctions regimes.[31] It has stated:

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28 *HM Treasury v Ahmed* [2010] UKSC2 at [60] (*Ahmed*).

29 *Ahmed* at [192] per Lord Brown.

30 International Covenant on Civil and Political Rights, article 14.

31 *Al-Dulimi and Montana Management Inc. v Switzerland*, European Court of Human Rights (Grand Chamber) Application No.5809/08 (2016) [146]–[147].

> in view of the seriousness of the consequences for the [European] Convention rights of those [listed] persons, where a resolution such as that in the present case, namely [UN Security Council] Resolution 1483 [which required the freezing of the assets and property of senior officials of the former Iraqi regime], does not contain any clear or explicit wording excluding the possibility of judicial supervision of the measures taken for its implementation, it must always be understood as authorising the courts of the respondent State to exercise sufficient scrutiny so that any arbitrariness can be avoided. By limiting that scrutiny to arbitrariness, the Court takes account of the nature and purpose of the measures provided for by the Resolution in question, in order to strike a fair balance between the necessity of ensuring respect for human rights and the imperatives of the protection of international peace and security.[32]

1.13 The rights to a private life and fair hearing may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective. In the case of executive powers which could seriously disrupt the lives of individuals subjected to them, the existence of safeguards is important to prevent arbitrariness and error, and ensure that the powers are exercised only in the appropriate circumstances.

1.14 The statement of compatibility states that the objective of the measure is to give effect to Australia's international obligation to prevent and suppress terrorist financing, and imposing sanctions helps to achieve this objective by denying persons the financial means to undertake terrorist activities.[33] This is a legitimate objective for the purposes of international human rights law and the measure may be regarded as rationally connected to this objective. The key question is whether the measure is proportionate.

1.15 The committee has consistently raised concerns that the sanctions regime, including sanctions to which this instrument relates, may not be regarded as proportionate, in particular because of a lack of effective safeguards to ensure that the regime, given its potential serious effects on those subject to it, is not applied in error or in a manner which is overly broad in the individual circumstances.[34]

1.16 For example, the minister is required to list a person as subject to sanctions on the broad grounds that the minister is satisfied that the person has committed, or attempted to commit, terrorist acts or participated in or facilitated the commission of terrorist acts.[35] The specific criteria as to how the minister determines these matters

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32 *Al-Dulimi and Montana Management Inc. v Switzerland*, European Court of Human Rights (Grand Chamber) Application No.5809/08 (2016) [146].

33 Statement of compatibility, pp. 4 and 6.

34 See, most recently, Parliamentary Joint Committee on Human Rights, *Report 8 of 2021* (23 June 2021) pp. 27–35 and *Report 10 of 2021* (25 August 2021) pp. 117–128.

35 Charter of the United Nations (Dealing with Assets) Regulations 2008, section 20.

is not set out in legislation. There is no requirement that there first be a judicial finding that the person has engaged in terrorist acts, and it would appear that the minister could list a person who had been acquitted of engaging in terrorist acts, as long as the minister is satisfied that the person had been involved.[36] The statement of compatibility states that the criteria on which a person is listed for sanctions is predictable and publicly available, reflecting what is set out in the UN Security Council Resolution.[37] While Resolution 1373 is indeed publicly available, the obligation imposed on states parties is framed in relatively broad terms, requiring states to freeze funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; or anyone who acts on behalf of, or at the direction of, such persons.[38] Resolution 1373 does not provide specific guidance on the threshold at which an individual may be declared by the minister and on what particular basis. This lack of clarity raises concerns that the measure may not be sufficiently circumscribed.

1.17 Of particular concern with respect to proportionality is that there is no provision for merits review before a court or tribunal of the minister's decision. While the minister's decision is subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act), the effectiveness of judicial review as a safeguard within the sanctions regime relies, in significant part, on the clarity and specificity with which legislation specifies powers conferred on the executive. The scope of the power to list someone is based on the minister's satisfaction in relation to certain matters which are stated in broad terms. This formulation limits the scope to challenge such a decision on the basis of there being an error of law (as opposed to an error on the merits) under the ADJR Act. The European Court of Human Rights has observed that for judicial review to be sufficient in the context of a dispute over a decision to list a person for sanctions, the court must be able to obtain:

> sufficiently precise information in order to exercise the requisite scrutiny in respect of any substantiated and tenable allegation made by listed persons to the effect that their listing is arbitrary. Any inability to access such information is therefore capable of constituting a strong indication that the impugned measure is arbitrary, especially if the lack of access is prolonged, thus continuing to hinder any judicial scrutiny.[39]

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36 See *Sayadi and Vinck v Belgium*, UN Human Rights Committee (Application No. 1472/2006) (22 October 2008) [10.8 and [10.12]], where the UN Human Rights Committee noted that as a criminal investigation against listed persons was dismissed, restrictions on those persons were not necessary and violated their right to freedom of movement and right to privacy.

37 Statement of compatibility, p. 6.

38 United Nations Security Council, Resolution 1373(1)(c), S/RES/1373 (2001), made on 28 September 2001.

39 *Al-Dulimi and Montana Management Inc. v Switzerland*, European Court of Human Rights (Grand Chamber) Application No.5809/08 (2016) [147].

1.18 Further, the Court has held that failure to afford a listed person 'at least a genuine opportunity to submit appropriate evidence to a court, for examination on the merits, to seek to show that their inclusion on the impugned lists had been arbitrary' impaired 'the very essence of their right of access to a court'.[40] Thus, the availability of judicial review in this context appears insufficient, in and of itself, to operate as an adequate safeguard for human rights purposes.

1.19 The minister can also make the listing without hearing from the affected person before the decision is made. While the initial listing may be necessary to ensure the effectiveness of the regime, as prior notice would effectively 'tip off' the person and could lead to assets being moved off-shore, there may be less rights-restrictive measures available, such as freezing assets on an interim basis until complete information is available including from the affected person.

1.20 Additionally, once the decision is made to list a person, the listing remains in force for three years and may be continued after that time.[41] The listing may be continued by the minister declaring in writing that it continues to have effect, but such a declaration is not a legislative instrument.[42] There also does not appear to be any requirement that if circumstances change or new evidence comes to light the listing will be reviewed before the three-year period ends. While a person may apply to have their listing revoked, the minister is not required to consider an application if the listed person has made an application within the year.[43] Without an automatic requirement of reconsideration if circumstances change or new evidence comes to light, a person may remain subject to sanctions notwithstanding that the listing may no longer be required.

1.21 There are also concerns relating to the minister's unrestricted power to impose conditions on a permit to allow access to funds to meet basic expenses. Giving the minister an unfettered power to impose conditions on access to money for basic expenses does not appear to be the least rights restrictive way of achieving the legitimate objective, noting that the type of conditions imposed will impact the potential extent of interference with rights.

Committee view

1.22 The committee acknowledges that sanctions regimes generally operate as mechanisms for applying pressure to regimes and individuals with a view to ending the repression of human rights internationally and suppressing terrorism. The committee notes the importance of Australia acting in concert with the international community to prevent egregious human rights abuses arising from situations of

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40 *Al-Dulimi and Montana Management Inc. v Switzerland*, European Court of Human Rights (Grand Chamber) Application No.5809/08 (2016) [151].

41 *Charter of the United Nations Act 1945*, section 15A.

42 *Charter of the United Nations Act 1945*, subsections 15A(2) and (5).

43 *Charter of the United Nations Act 1945*, section 17.

international concern, including the importance of satisfying Australia's obligations under the UN Charter.

1.23 However, for those in Australia who may be subject to sanctions, requiring ministerial permission to access money for basic expenses could, in practice, impact greatly on a person's private life as well as the privacy of their family. The committee also notes that the minister, in making a listing, is not required to hear from the affected person at any time; or provide reasons for the listing; and there is no provision for merits review of any of the minister's decision (including any decision to grant, or not grant, a permit allowing access to funds). As such, the committee considers these listings engage and limit the right to privacy and a fair hearing for those in Australia. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.24 While the committee acknowledges that Australia's obligations under the UN Charter may override Australia's obligations under international human rights treaties, it notes that European Court of Human Rights jurisprudence has held that UN Security Council Resolutions, such as Resolution 1373 to which this instrument relates, are to be interpreted on the basis that they are compatible with human rights.

1.25 On the basis of the significant human rights concerns identified by the committee previously in relation to sanctions regimes that apply to individuals, the committee has previously made a number of recommendations,[44] several of which have been implemented in relation to a comparable regime in the United Kingdom, to ensure the compatibility of the sanctions regimes with human rights. It does not appear that the committee's previous recommendations have been implemented. As such, the committee seeks the minister's advice as to why the sanctions regime does not include each of the following recommendations:

(a) the provision of publicly available guidance in legislation setting out in detail the basis on which the minister decides to list a person;

(b) regular reports to Parliament in relation to the basis on which persons have been listed and what assets, or the amount of assets, that have been frozen;

(c) provision for merits review before a court or tribunal of the minister's decision to list a person;

(d) regular periodic reviews of listings;

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44 Parliamentary Joint Committee on Human Rights, *Report 15 of 2021* (8 December 2021), pp. 2–11 (Autonomous Sanctions) and *Report 8 of 2021* (23 June 2021) pp. 27–35 and *Report 10 of 2021* (25 August 2021) pp. 117–128 (Charter of UN Sanctions). See also *Report 9 of 2016* (22 November 2016) p. 53; *Report 6 of 2018* (26 June 2018) pp. 128–129; and *Report 2 of 2019* (2 April 2019) p. 122.

(e) automatic reconsideration of a listing if new evidence or information comes to light;

(f) limits on the power of the minister to impose conditions on a permit for access to funds to meet basic expenses;

(g) review of individual listings by the Independent National Security Legislation Monitor;

(h) provision that any prohibition on making funds available does not apply to social security payments to family members of a listed person (to protect those family members); and

(i) consultation with operational partners such as the police regarding other alternatives to the imposition of sanctions.

1.26 Additionally, regarding the compatibility of this specific instrument with the right to a private life, the committee seeks the minister's advice in relation to:

(a) whether consideration is given to the potential impact on family members or other dependents when a decision is made to freeze the assets of a person located in Australia;

(b) if a freezable asset is a joint asset, such as a joint bank account of a listed person and their spouse, what safeguards are in place to ensure that any interference with the privacy of the joint asset owner is proportionate; and

(c) what types of conditions would the minister impose on a permit for access to funds to meet basic expenses.

Migration Amendment (Resolution of Status Visa) Regulations 2023[45]

FRL No.	F2023L01393
Purpose	Schedule 1 amends the *Migration Regulations 1994* to expand the cohort of persons on temporary visas who may apply for a permanent Resolution of Status visa. Schedule 2 requires that a permanent visa must be refused where a person fails to provide identity information
Portfolio	Home Affairs
Authorising legislation	*Migration Act 1958*
Disallowance	15 sitting days after tabling (tabled in the House of Representatives on 19 October 2023 and in the Senate on 6 November 2023. Notice of motion to disallow must be given by 5 December 2023 in the Senate and by 14 February 2024 in the House)[46]
Rights	Equality and non-discrimination; protection of the family; liberty

Refusal of permanent visas on identity grounds

1.27 This legislative instrument amends the circumstances in which people on certain temporary visas may apply for a permanent visa, and the circumstances in which such an application must be refused. Most people to whom this measure relates are people who sought to claim asylum in Australia after travelling by boat without a valid visa ('unauthorised maritime arrivals').[47]

1.28 In February 2023, the *Migration Regulations 1994* were amended to enable persons who arrived in Australia before 14 February 2023 and who applied for, or obtained, temporary protection in Australia through a Subclass 785 (Temporary Protection) visa (TPV) or a Subclass 790 (Safe Haven Enterprise) visa (SHEV) to

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45 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration Amendment (Resolution of Status Visa) Regulations 2023, *Report 12 of 2023*; [2023] AUPJCHR 115.

46 In the event of any change to the Senate or House's sitting days, the last day for the notice would change accordingly.

47 Statement of compatibility, p. 11. Specifically, this measure would appear to relate to those unauthorised maritime arrivals who arrived in Australia by boat without a visa between 13 August 2012 and the end of December 2013, after which time such persons were subject to mandatory removal for offshore processing. The total number of people in the 'legacy caseload' is about 31,000 as at March 2023. See, Department of Home Affairs, *UMA Legacy Caseload Report on Processing Status and Outcomes March 2023* (released 20 April 2023).

transition to a permanent visa.[48] The explanatory statement accompanying that measure stated that there is a group of approximately 18,500 people who have been found to engage protection obligations (or to be members of the same family unit as someone who has) and who have been granted temporary protection visas, most of whom have been living in Australia temporarily for almost a decade and have no realistic prospects for permanency.[49]

1.29 The explanatory statement states that it was identified that further amendments were required to address gaps in the legislative scheme, which had inadvertently excluded certain persons from eligibility for a permanent Resolution of Status (RoS) visa application.[50] Schedule 1 of this measure enables people in these categories to apply for a RoS visa.[51]

1.30 In addition, the measure adds a new ground on which a RoS visa application must be refused. In applying for this visa, an applicant must provide evidence of their identity (by producing documents from their home country or a place they were in before they came to Australia) or otherwise provide a reasonable excuse as to why they cannot.[52] Schedule 2 inserts new criteria for the issue of this visa where an invitation to give identity information has been issued, and the applicant either does not provide the requested information, or provides a bogus document or false or misleading information (and does not have a reasonable explanation for doing so and does not take reasonable steps to provide the information).[53] New section 851.229 provides that where there are 'substantial concerns' with previous identity findings the applicant will only be eligible for the visa if: they would be eligible for a protection visa; there are compassionate or compelling circumstances for granting the RoS visa; or they are a family member of a person with a RoS visa. The statement of

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48 Migration Amendment (Transitioning TPV/SHEV Holders to Resolution of Status Visas) Regulations 2023 [F2023L00099].

49 Migration Amendment (Transitioning TPV/SHEV Holders to Resolution of Status Visas) Regulations 2023 [F2023L00099], explanatory statement, p. 4.

50 Specifically, the measure permits applications by: persons who held a TPV or SHEV on 14 February 2023, but who failed to apply for a RoS visa before their TPV or SHEV ceased, who were previously unable to apply for a RoS visa; initial TPV or SHEV applicants (who do not have their own claims for protection, but are a family member of a person who does) who were previously unable to have their TPV or SHEV application converted to a RoS visa application if the family member is found to engage protection obligations; persons who did not hold a TPV or SHEV on 14 February 2023, but who had held a TPV or SHEV before that day, who were previously unable to have their TPV or SHEV application converted to a RoS visa application; and persons who have previously made a valid application for a TPV or SHEV which was finalised, but who have never held a TPV or SHEV, and who were previously unable to have the current TPV or SHEV application converted to a RoS visa application.

51 Schedule 1, items 1-16.

52 Department of Home Affairs, *Identity requirements for protection visa applicants*.

53 Schedule 2, Section 851.228.

compatibility states that these amendments have the effect that if these criteria are not met, the application must be refused.[54]

Preliminary international human rights legal advice

Rights to equality and non-discrimination; protection of the family; liberty

1.31 Schedule 2, by requiring that an application must be refused where an applicant does not satisfy an invitation to provide personal identification information, engages and may limit human rights.[55] The refusal of a RoS visa may have significant consequences for an individual. As the statement of compatibility notes, persons who are refused the grant of a RoS visa will remain on their bridging visa, TPV or SHEV until it ceases 35 days after the RoS visa application is finally determined (which usually includes the completion of merits review processes).[56] Were this to occur, the person would be liable for removal from Australia as an unlawful non-citizen[57] and would be subject to mandatory immigration detention (with no maximum detention period) while awaiting removal. As such, the measure may engage and limit the right to liberty, which prohibits the arbitrary and unlawful deprivation of liberty, including with respect to immigration detention.[58] The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability. This committee has consistently raised concerns regarding the compatibility with the right to liberty of mandatory immigration detention under the *Migration Act 1958*.[59] Further, in cases considering individuals detained under Australia's mandatory immigration detention scheme, the United Nations (UN) Human Rights Committee has found that the combination of subjecting individuals to arbitrary and protracted and/or indefinite detention, the absence of procedural safeguards to challenge that detention, and the difficult detention conditions, cumulatively inflicts serious psychological harm on such

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54 Statement of compatibility, p. 11.

55 Schedule 1, by enabling more people who arrived in Australia by boat without a valid visa (and have been in Australia for 10 years) to apply for a permanent visa engages and promotes several human rights, including the right to social security, an adequate standard of living, education, protection of the family, and freedom of movement.

56 Statement of compatibility, p. 8.

57 Note that section 197C of the *Migration Act 1958* provides that a non-citizen cannot be removed to the country in relation to which their protection claims have been accepted, unless the non-refoulement obligations no longer apply or the person requests in writing to be removed.

58 International Covenant on Civil and Political Rights, article 9.

59 See, most recently, Parliamentary Joint Committee on Human Rights, Migration Amendment (Clarifying International Obligations for Removal) Bill 2021, *Report 7 of 2021* (16 June 2021), pp. 100-124.

individuals that amounts to cruel, inhuman or degrading treatment.[60] In this respect, the most recent statistics regarding length of immigration detention indicate that the average length of detention is 708 days, while over ten per cent of all detainees have been detained for more than five years.[61]

1.32 If a person who is refused a RoS visa does not secure another visa and is required to leave Australia, this may limit the right to protection of the family for those with family members in Australia. This right requires the state not to arbitrarily or unlawfully interfere in family life and to adopt measures to protect the family.[62] An important element of protection of the family is to ensure family members are not involuntarily separated from one another. Further, if this measure were to disproportionately impact on people of a particular nationality in practice, it may engage the right to equality and non-discrimination.[63] The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.[64] The right to equality encompasses both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on the enjoyment of rights).[65] Indirect discrimination occurs

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60 *F.K.A.G v. Australia*, UN Human Rights Committee Communication No. 2094/2011 (2013) [9.8]. See also *F.J. et al. v. Australia,* UN Human Rights Committee Communication No. 2233/2013 (2016) [10.6].

61 Department of Home Affairs, *Immigration Detention and Community Statistics Summary August 2023* (released 13 October 2023).

62 International Covenant on Civil and Political Rights, articles 17 and 23; and the International Covenant on Economic, Social and Cultural Rights, article 10.

63 In this regard, it is noted that in April 2023, the Department of Home Affairs stated that the majority of the 'unauthorised maritime arrival legacy caseload' with visa processes finalised (that is, either refused or approved) were from Iran and Afghanistan, whereas those where visa applications were on hand were primarily Iranian and stateless. See, *UMA Legacy Caseload Report on Processing Status and Outcomes March 2023* (released 20 April 2023).

64 International Covenant on Civil and Political Rights, articles 2 and 26. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights also prohibits discrimination specifically in relation to the human rights contained in the International Covenant on Economic, Social and Cultural Rights.

65 UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989).

where 'a rule or measure that is neutral at face value or without intent to discriminate' exclusively or disproportionately affects people with a particular protected attribute.[66]

1.33 The rights to protection of the family and to liberty may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective. With respect to the right to equality and non-discrimination, differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if it is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.[67]

1.34 The statement of compatibility states that the primary objective of the measure is to ensure that any person granted a permanent visa has properly established their identity, in line with the expectations of the Australian community.[68] It states that there are people affected by this measure who arrived in Australia undocumented, or with limited identity information, but because they were found to engage Australia's protection obligations they were granted a temporary protection visa based on the information available. However, 'the Government considers it appropriate to require a greater degree of satisfaction in relation to identity in order to grant a person permanent residence in Australia'.[69] It further states that the measure seeks to help resolve any doubts in relation to a person's identity before they are granted permanent residence, to facilitate their future dealings with the Australian government such as acquiring Australian citizenship and an Australian passport'.[70] It

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66 *Althammer v Austria*, UN Human Rights Committee Communication no. 998/01 (2003) [10.2]. The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'. See Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 3rd edition, Oxford University Press, Oxford, 2013, [23.39].

67 UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2].

68 Statement of compatibility, p. 12.

69 Statement of compatibility, p. 10. It further states that the aim is to: allow the department to assure itself, as far as possible, of the identity of the persons transitioning to the RoS visa; ensure that those people who are given a permanent visa transition 'in the circumstances that reflect the broad policy objectives of the transition – that is to transition to permanent residence those persons in the TPV/SHEV caseload who have been found to engage Australia's protection obligations, or to be a member of the same family unit of someone who does, and/or who have established lives in Australia as TPV/SHEV holders'.

70 Statement of compatibility, p. 10.

also states that 'the Department of Home Affairs has identified instances of suspected identity fraud in this caseload'.

1.35 Under international human rights law a legitimate objective is one that is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the right. It is not sufficient that, for example, a measure simply seeks an outcome regarded as desirable or convenient. In this regard, it is not clear that establishing the identity of people to a standard that 'meets community expectations' and facilitating passport and citizenship applications in future is a pressing and substantial need that warrants limiting rights. For example, it is not clear that a person who fails to produce acceptable identity documents from before they entered Australia, or otherwise fails to give a reasonable excuse for not being able provide those documents, poses some risk of harm to the community (a risk which does not exist while they are on a temporary visa). In addition, the stated objective of avoiding future problems that people on a permanent visa may face applying for citizenship or a passport in future would appear to be an objective of domestic administrative convenience, which is unlikely to be sufficient to constitute a legitimate objective for the purposes of international human rights law. In addition, while the statement of compatibility states that instances of suspected identity fraud have been identified, it does not explain the extent of this suspected problem, nor does it explain the consequences of this, for example, whether this puts in doubt whether Australia owes protection obligations to such persons.

1.36 Further, Australia has obligations under the 1951 Convention Relating to the Status of Refugees (Refugee Convention) to facilitate the provision of identity documents to 'ensure that all refugees, even those not lawfully residing in the territory, [are] spared the hardship of having no identity papers at all'.[71] People in Australia on a SHEV or TPV who do not have, and cannot obtain, a passport recognised by the Australian Government are provided with photographic identification to provide evidence of their 'commencement of identity' in Australia.[72] However, it is not clear that imposing a higher threshold for acceptable identification documents with respect to people who sought to claim asylum in Australia by boat ten years prior (and who may therefore be less likely to be in a position to secure identity documents now) in order to be eligible for a permanent visa would be consistent with the Refugee Convention. In this regard, it is noted that people affected by this measure will likely have established new lives in Australia given they have now lived here for over a decade, including securing employment or undertaking study, and having families. Given that the consequences of being refused a RoS visa and not securing another visa

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71 1967 Convention on the Status of Refugees, article 27. See further, UN High Commissioner on Refugees, *Identity Documents for Refugees Executive Committee Meeting, EC/SCP/33* (20 July 1984). While this Convention does not fall within this committee's statutory remit, it is nevertheless a relevant consideration and forms part of Australia's international human rights law obligations.

72 Department of Home Affairs, Immicard.

of any kind may be severe (that is, mandatory detention and/or removal from Australia) the consequences of this measure may have significant human rights implications. In this regard, the statement of compatibility notes that people who are refused a RoS visa will remain on their bridging visa, TPV or SHEV until it ceases 35 days after the RoS visa application is finally determined.[73] Given the potential significant interference with a number of human rights should a person fail to secure a RoS visa because of these additional identity requirements, and noting that limited information has been provided in the statement of compatibility as to the necessity of these changes, further information is required in order to determine whether this measure seeks to achieve a legitimate objective under international human rights law.

1.37 A further important consideration is whether the limitation on these rights is proportionate to the objective being sought. In this respect, it is necessary to consider whether the limitation is sufficiently circumscribed; whether it is accompanied by sufficient safeguards; whether any less rights restrictive alternatives could achieve the same stated objective; and the possibility of oversight and the availability of review.

1.38 As to whether the measure is sufficiently circumscribed, this measure has the effect that where a person does not satisfy the identity requirements, or does not have a reasonable explanation for failing to do so and has not made reasonable steps to provide the information, or does not respond to the request at all, their application for a RoS visa *must* be refused.[74] While the source of this legislative requirement that an application must be refused is not clear, there is no apparent discretion available to a decision-maker to grant a visa despite this failure. The capacity to provide an explanation for not providing documents may have safeguard value, depending on how broadly this is applied in practice. For example, the explanatory statement indicates that a 'reasonable explanation' for failing to provide identity information may include where the person could only obtain a particular document by requesting it directly from the authorities of the country in relation to which they have made protection claims and it would not be reasonable to expect them to contact those authorities.[75] This would appear to provide applicants with a degree of flexibility in seeking to comply, however it is not clear whether this provision would assist where a person's circumstances did not meet the threshold of 'protection obligations' under refugee law but the person nevertheless had concerns about contacting authorities (for example, a woman escaping a violent relationship in a country where they had limited domestic rights, or a person from a country such as Afghanistan where the government has dramatically changed). In this regard, it is noted that recent case law

73 Statement of compatibility, p. 8.

74 Explanatory statement, p. 19.

75 Explanatory statement, p. 19.

relating to similar legislative identity requirements would appear to suggest that the threshold for a reasonable excuse may be high in practice.[76]

1.39 The statement of compatibility further states that there are additional protections where there are 'substantial identity-related concerns' in relation to a person to ensure that they are not returned to a country where they are at risk of persecution. It states, for example, that if a person was invited to provide further information to establish their identity, where there is information before the department to suggest that their identity is different to the identity that was previously accepted, and they provide information that confirmed a different identity, the amendments provide a mechanism for a visa to still be granted if the decision-maker is satisfied that the person would meet the criteria for a protection visa in that new identity, they are a family member of a RoS visa holder, or there are compelling or compassionate reasons to grant the visa.[77] The statement of compatibility also states that there may be instances where a person's reasonable explanation means that they will not be able to take reasonable steps to provide the information, in which case the new requirement to provide identity information in response to an invitation to do so will be taken to be satisfied.[78] These provisions may have important safeguard value. However, it is unclear if allowing a person to be granted a RoS if they meet the criteria for a protection visa means they would need to reprove their protection claim, and if so, what process would be followed in relation to this. It is not clear what legislative criteria would govern the grant of a RoS on the grounds that the person is owed protection, including what steps would need to be followed and whether an applicant would be granted procedural fairness, including review rights.

1.40 It is also unclear whether 'substantial identity-related concerns' could include circumstances where a person has failed to provide required identity information, or a reasonable excuse, or respond to the request at all, even where the department has no information suggesting that the person may have a different identity to that which they had previously advised. As such, if a person were simply unable to provide documentation to prove their identity (or did not respond to a request), it is not clear

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76 For example, in *DXG17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FedCFamC2G 175 (8 March 2023) the Federal Court considered section 91W of the *Migration Act 1958*, which establishes the identity requirements for the issue of a protection visa. The court noted that it allows the Minister to request that an applicant provide documents falling into the broad category of documents that show the applicant's identity, nationality or citizenship, and permits them to require certain documents that an applicant claimed to have been in possession of in the past. It found that, by extension, finding that the applicant did not have a reasonable explanation for failing to produce the documents that were once in his possession meant that it could not be satisfied that he had a reasonable explanation for failing to comply with the request, even if he could have provided a reasonable explanation as to why there were some types of identity documents that he never held (at [85]).

77 Statement of compatibility, p. 12.

78 Statement of compatibility, p. 12

whether a visa may still be granted to them on compassionate or compelling grounds. Further, it is unclear what such grounds may include, and whether the fact that a person has resided in Australia continuously for 10 years itself constitutes a compelling or compassionate reason for granting a visa despite any failure to establish identity to the standard required.

1.41 In addition, it is unclear how effective these legislative safeguards may be in practice, given the likely vulnerability of affected persons (namely, asylum seekers who travelled to Australia by boat between 2012 and 2013 and who have remained in Australia since on temporary visas). It is likely that applicants may have a high degree of vulnerability, such as having limited ability to read and speak English, limited education and/or a lack of stable housing (and therefore, a stable address).[79] As such, their capacity to engage with these processes may depend on access to legal advice, translation services and other social support. In addition, it is not clear whether a person in this cohort who does not have a regular mailing address or access to an email or phone system, and who may therefore not respond to a request for identity information, would have another opportunity to provide the information without penalty. It is also not clear what support would be provided to such persons in order for them to meet this requirement (e.g. will face-to-face interviews be provided or will it all be conducted on the papers).

1.42 Further, it is not clear whether other, less rights-restrictive alternatives would be ineffective to achieve the stated objective of the measure. The explanatory statement states that the minister *must* refuse a visa application if a person does not provide identity information and they do not have a reasonable explanation or do not take reasonable steps to provide it.[80] It is not clear on the face of the amendments where the mandatory aspect of this comes from (noting the provision itself does not say 'must'). If the visa must be refused on these grounds, it has not been established why it is necessary to require the visa to be refused, rather than providing a discretion as to whether to refuse the visa. In this regard, it is noted that the department did not undertake any consultation regarding this measure.[81]

1.43 As to the availability of review, the statement of compatibility states that 'it is expected that a person refused a RoS visa, including on the basis of the new identity-related criteria, will be able to make an application for a further RoS visa, or may choose to pursue merits review'.[82] The availability of review may assist with the proportionality of the measure, provided that it is indeed available and is accessible. However, if the legislative framework itself establishes stringent requirements for the provision of identity documents and requires that an application must be refused

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79 See further, Australian Human Rights Commission, *Lives on hold: Refugees and asylum seekers in the 'Legacy Caseload'* (2019).

80 Explanatory statement, p. 19.

81 Explanatory statement, p. 3.

82 Statement of compatibility, p. 12.

where this is not met, this may have limited value in practice. The statement of compatibility states that persons who are refused the grant of a RoS visa will remain on their TPV or SHEV until it ceases 35 days after the RoS visa application is finally determined.[83] It is not clear if this would only be taken to be a refusal decision (refusal of the RoS) or a cancellation decision (cancellation of the TPV/SHEV), and whether this affects the review rights available. Further, while the statement of compatibility states that a person who is refused a RoS may apply for another RoS visa, it is not clear on what legislative grounds they can apply for a new RoS visa and in what timeframe they would need to do this. Moreover, unauthorised maritime arrivals are prevented from making a further visa application unless the minister allows them to do so (known as 'lifting the bar').[84] The statement of compatibility states that 'the application bar lift for the RoS visa is currently open ended'.[85] However, it is noted that this lifting of the bar is purely a ministerial discretion, which could change at any time, in which case a person refused a RoS visa may have no ability to apply for another RoS visa to put forward their claim for protection.

Committee view

1.44 The committee notes that expanding the cohort of people who may apply for a permanent Resolution of Status (RoS) visa promotes a number of rights, including the rights to social security, an adequate standard of living, education, protection of the family and freedom of movement.

1.45 However, the committee notes that by requiring that an application for a RoS visa must be refused where an applicant does not provide personal identification information, this measure also engages and may limit human rights, including the right to protection of the family as it may separate family members, the right to equality and non-discrimination as it may have a disproportionate impact on people of certain nationalities, and the right to liberty as refusal of the visa may lead to mandatory immigration detention. These rights may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.46 The committee considers further information is required to assess the compatibility of this measure with these rights, and as such seeks the minister's advice in relation to:

(a) whether requiring a greater degree of satisfaction in relation to identity in order to grant a person permanent residence (as opposed to temporary residence) is a legitimate objective addressing an issue of

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83 Statement of compatibility, p. 8.

84 *Migration Act 1958*, section 46A.

85 Statement of compatibility, p. 11.

public or social concern that is pressing and substantial enough to warrant limiting these rights;

(b) what is the legislative source that establishes that the minister must refuse a visa application where identity requirements have not been met;

(c) why giving a decision-maker the discretion to refuse a visa on identity-related grounds, as opposed to requiring that they must refuse a visa, would be ineffective to achieve the objective of the measure;

(d) what is meant by 'substantial identity-related concerns';

(e) what circumstances are likely to constitute 'compelling or compassionate grounds' and whether the fact that a person has resided in Australia continuously for 10 years would itself constitute a compelling reason for granting a permanent visa;

(f) what legal and social supports are available to people in this cohort in applying for these visas and seeking to obtain and translate identity documents from countries outside Australia;

(g) what happens if a person is refused a RoS visa: can they apply for a new RoS visa and in what timeframe would they need to do this. Noting unauthorised maritime arrivals are prevented from making a further visa application unless the minister allows them to do so, is this ministerial discretion, rather than a legislative requirement, an appropriate safeguard;

(h) if refusal of a RoS visa leads to cancellation of the existing TPV or SHEV, will this be treated as a decision to refuse the RoS or a decision to cancel the TPV/SHEV, and what review rights apply;

(i) noting that a person can still receive a RoS visa if it is demonstrated that they meet the criteria for a protection visa, will this require a reopening of the person's protection visa claims and what process will be followed to assess such claims, and how will this ensure procedural fairness; and

(j) whether the measure will have a disproportionate impact on persons based on protected characteristics (such as nationality), and if so whether this would constitute lawful differential treatment.